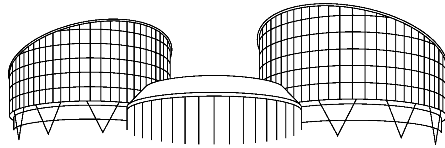

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 9173/14
G
against Germany

The European Court of Human Rights (Fifth Section), sitting on 28 May 2019 as a Chamber composed of:
Yonko Grozev, *President,*
Angelika Nußberger,
Ganna Yudkivska,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar*,
Having regard to the above application lodged on 22 January 2014,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr G, is a German national who was born in 1968 and is currently detained in the preventive detention centre at Schwalmstadt Prison. The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented before the Court by Mr H. Korte, a lawyer practising in Kassel. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. It its judgment in the applicant's previous case (*G v. Germany*, no. 65210/09, 7 June 2012), the Court had held that the subsequent order for

the applicant's preventive detention made by the Frankfurt am Main Regional Court on 13 March 2008 and confirmed on appeal had violated Article 7 § 1 of the Convention. The applicant alleged that the domestic courts' refusal to reopen the criminal proceedings against him, to quash the judgment of 13 March 2008 by which his preventive detention had been ordered "subsequently" (*nachträgliche Sicherungsverwahrung*; in respect of the terminology, see *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 104-106 and § 157, 4 December 2018) and to order his release, despite the Court's judgment of 7 June 2012, amounted to a further breach of Article 7 § 1 of the Convention. Moreover, the continued execution of his preventive detention breached Article 5 § 1 of the Convention.

4. On 7 September 2015 notice of the application was given to the Government.

A. The circumstances of the case

1. Background to the case

5. The background to the case, notably the applicant's conviction by the Frankfurt am Main Regional Court on 6 February 1992 of three counts of murder and one count of attempted murder, and sentence of fifteen years' imprisonment and order of his placement in a psychiatric hospital, as well as the subsequent order of his preventive detention under Article 66b § 3 of the Criminal Code by judgment of that court of 13 March 2008, has been reflected in the Court's judgment in the applicant's previous case (*G v. Germany*, cited above, §§ 6-32). In paragraph 70 of that judgment, the Court noted "that the present case only [concerned] the initial order for the applicant's [subsequent] preventive detention made by the Frankfurt am Main Regional Court on 13 March 2008 and ... [that] the Court's findings in the present case [were] without prejudice to the Convention compliance of the applicant's current detention, which [was] at present being reviewed by the domestic courts."

2. The proceedings at issue

(a) The proceedings before the Regional Court

(i) The submissions of the parties to the proceedings

6. On 25 September 2012 the applicant lodged a request under Article 359, no. 6, of the Code of Criminal Procedure (see paragraph 35 below) with the Frankfurt am Main Regional Court to reopen the proceedings which had ended with that court's judgment of 13 March 2008 and to quash the subsequent preventive detention order made therein. The applicant further requested the suspension of the execution of his detention

under Article 360 § 2 of the Code of Criminal Procedure (see paragraph 35 below).

7. The applicant argued that, as required for a reopening under Article 359 no. 6 of the Code of Criminal Procedure, the European Court of Human Rights had found in its judgment of 7 June 2012 that the subsequent preventive detention order made against him had breached the Convention, namely Article 7 § 1 thereof. Furthermore, the Frankfurt am Main Regional Court's judgment of 13 March 2008 was based on that violation of the Convention. If the Regional Court had been aware that the order for his preventive detention under Article 66b § 3 of the Criminal Code was in breach of the Convention, it would have been prevented from applying that provision of the Criminal Code and would thus not have ordered his subsequent preventive detention. As his deprivation of liberty in breach of the Convention was a consequence of the Regional Court's judgment, that judgment had to be quashed in order to end that deprivation of liberty.

8. The request was forwarded to the competent Darmstadt Regional Court.

9. On 21 November 2012 the prosecution requested that the applicant's application to reopen the proceedings be dismissed. It argued that, even applying the strictest standard possible under the Federal Constitutional Court's leading judgment on preventive detention of 4 May 2011 (see paragraph 30 below), the applicant's preventive detention would have been ordered. Owing to specific circumstances relating to his person and his conduct, there was a high risk that the applicant would again commit the most serious crimes of violence and sexual offences. Moreover, there were indications that the applicant suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act (see paragraph 34 below).

10. In his further submissions of 17 December 2012, the applicant contested the prosecution's view. He argued that it could not be ruled out that the Frankfurt am Main Regional Court's judgment of 13 March 2008 was based on the breach of Article 7 of the Convention at issue, as there had not only been a breach of the Convention as a result of a procedural mistake, but a breach of a substantive right, the prohibition on retrospective punishment. He further submitted that it was irrelevant for the reopening proceedings whether, as the prosecution had submitted, he suffered from a mental disorder as defined by the Therapy Detention Act. An order under that Act was not at issue in the reopening proceedings and the said Act was possibly unconstitutional itself.

(ii) The Regional Court's decision

11. On 20 December 2012 the Darmstadt Regional Court dismissed the applicant's request to reopen the proceedings as inadmissible (Article 368 § 1 of the Code of Criminal Procedure; see paragraph 35

below). It further dismissed the applicant's request under Article 360 § 2 of the Code of Criminal Procedure to suspend the execution of the preventive detention order.

12. The Darmstadt Regional Court considered that the Frankfurt am Main Regional Court's judgment of 13 March 2008 was not based on the breach of Article 7 of the Convention found by the European Court of Human Rights in its judgment of 7 June 2012, as required by Article 359 no. 6 of the Code of Criminal Procedure.

13. The Darmstadt Regional Court found that, even if the Frankfurt am Main Regional Court had taken into account that Article 66b § 3 of the Criminal Code violated Article 7 of the Convention, it would, without any doubt, have taken the same decision and would have ordered the applicant's subsequent preventive detention. Having regard to the findings of the Federal Constitutional Court in its judgment of 4 May 2011, which were binding on all German courts, the latter had further to apply Article 66b § 3 of the Criminal Code until 31 May 2013, subject to a strict proportionality test. However, even applying that strict standard of proportionality, a preventive detention order would have been made against the applicant.

14. The Darmstadt Regional Court noted that the psychiatric experts L. and H., heard by the Frankfurt am Main Regional Court in the proceedings before it, had found that there was a high risk that the applicant would commit further offences comparable to those of which he had been convicted, that is, murders for sexual motives or in order to cover up previous violent sexual offences, if released. According to expert L., even if the applicant did not suffer from a sadistic deviance, the combination of aggressive and sadistic sexual impulses, as well as the applicant's lack of empathy were, among other elements, causes for that high risk. The applicant had refused any treatment throughout his detention. Having regard to these findings, the Regional Court was satisfied that there was a particularly high risk that the applicant would commit the most serious offences, namely capital offences, if released.

15. The Darmstadt Regional Court finally observed that the applicant would probably be transferred to a branch of Schwalmstadt Prison on the premises of Weiterstadt Prison on 15 January 2013, where preventive detention was to be executed in accordance with the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment. The applicant's situation in detention from then onwards might be different from that at issue in the European Court of Human Rights' judgment.

(b) The proceedings before the Court of Appeal

16. On 21 January 2013 the applicant lodged an appeal against the Darmstadt Regional Court's decision. He argued that in its judgment of 7 June 2012 the European Court of Human Rights had found with binding

effect that the order for his subsequent preventive detention in the Frankfurt am Main Regional Court's judgment of 13 March 2008 was in breach of Article 7 § 1 of the Convention. The impugned judgment had thus breached a substantive Convention provision in the rank of German Federal law and was based on that breach of the law. He further took the view that the Federal Constitutional Court's case-law as laid down in its judgment of 4 May 2011 did not alter that finding, as that case-law obviously did not comply with the requirements of the Convention.

17. On 29 April 2013 the Frankfurt am Main Court of Appeal dismissed the applicant's appeal. It found that the applicant's appeal was admissible, but ill-founded. It endorsed the Darmstadt Regional Court's finding that the applicant's request to reopen the proceedings was inadmissible (Article 368 § 1 of the Code of Criminal Procedure) because the applicant had not sufficiently substantiated that there was a statutory ground for reopening the proceedings. As a consequence, his request to suspend the execution of his preventive detention under Article 360 § 2 of the Code of Criminal Procedure equally had to be dismissed.

18. The Court of Appeal explained that a request to reopen the proceedings under Article 359 of the Code of Criminal Procedure questioned the impugned judgment's finality, which served legal certainty. If the finality of a judgment should exceptionally be set aside in the interest of individual justice, the convicted person, represented by counsel, could be expected to substantiate sufficiently that the judgment suffered from such a grave mistake as to justify a reopening of the proceedings. If it could be established that the impugned judgment was not based on a breach of the Convention, reopening the proceedings under Article 359 no. 6 of the Code of Criminal Procedure was excluded.

19. The Court of Appeal found that in his request to reopen the proceedings of 25 September 2012 and his submissions of 17 December 2012, the applicant failed to substantiate sufficiently that the judgment of 13 March 2008 was based on the breach of the Convention later found by the European Court of Human Rights. It was not sufficient for the applicant to have argued in this respect that if the Frankfurt am Main Regional Court had not breached the Convention, it would not have ordered the applicant's subsequent preventive detention. The applicant's reasoning would only have been sufficient if ordering his subsequent preventive detention under Article 66b § 3 of the Criminal Code in the version then in force had not been possible under any circumstances without a breach of the Convention. However, that reasoning was not correct from a legal point of view.

20. The Court of Appeal found that, in accordance with the Federal Constitutional Court's well-established case-law, the European Court of Human Rights' finding that the judgment of the Frankfurt am Main Regional Court or the legal provision on which it had been based had breached the Convention, did not automatically entail the consequence that

the impugned judgment had to be set aside. While the High Contracting Parties had undertaken, by Article 46 of the Convention, to abide by the final judgments of the Court in any case to which they were parties, the Court's judgments were declaratory in nature. The respondent State was under the obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded. However, it was free to choose the means by which it would discharge that obligation. In the present case, this would have obliged the Frankfurt am Main Regional Court to interpret Article 66b § 3 of the Criminal Code in the manner set out by the Federal Constitutional Court in its judgment of 4 May 2011, by which that court had held that the provision remained applicable until the entry into force of new legislation and until 31 May 2013 at the latest (see paragraph 30 below) and in its decision in the applicant's case of 6 February 2013 (see paragraph 25 below).

21. In view of the foregoing, it had been necessary for the applicant to substantiate that the conditions for his subsequent preventive detention, having regard to the standard of proportionality as defined by the Federal Constitutional Court, had not been met from a factual point of view and that the Frankfurt am Main Regional Court would not, therefore, have ordered his subsequent preventive detention under Article 66b § 3 of the Criminal Code. However, he had not given any explanation why there was not a high risk that he would commit the most serious crimes of violence or sexual offences if released. Likewise, he had not substantiated that he did not suffer from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act.

(c) The proceedings before the Federal Constitutional Court

22. On 5 June 2013 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Darmstadt Regional Court and of the Frankfurt am Main Court of Appeal. He complained, in particular, that these two decisions, as well as the judgment of the Frankfurt am Main Regional Court of 13 March 2008, had breached, *inter alia*, his constitutional right to liberty and the prohibition on retrospective punishment. He argued that the interpretation, by the lower courts, of the notion of a judgment being "based" on a breach of the Convention had disregarded the fact that, when the judgment of 13 March 2008 had been adopted, there had not only been a procedural mistake, but a breach of substantive fundamental rights, including the prohibition on retrospective punishment. It could not be ruled out that his subsequent preventive detention would not have been ordered if the Frankfurt am Main Regional Court had taken into account the fact that Article 66b § 3 of the Criminal Code breached the Constitution and the Convention.

23. On 22 July 2013 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without giving reasons in

respect of the above complaints (file no. 2 BvR 1255/13). The decision was served on the applicant's counsel on 31 July 2013.

3. Further proceedings for the review of the applicant's preventive detention

24. In proceedings for the review of the continuation of the applicant's preventive detention, the Frankfurt am Main Court of Appeal, on 22 August 2011, dismissed the applicant's appeal against the Marburg Regional Court's decision refusing to terminate his preventive detention. Endorsing the reasons given by the Regional Court, the Court of Appeal considered that in accordance with the conditions set up by the Federal Constitutional Court in its leading judgment of 4 May 2011, the continuation of the applicant's preventive detention was subject to a strict review of proportionality, that is, there had to be a danger of the person concerned committing serious crimes of violence or sexual offences if released. These conditions were met in the applicant's case as there was a risk that he would commit treacherous murders to satisfy his sexual desires if released. The stricter standards set up by the Federal Constitutional Court in its said judgment, for a continuation of preventive detention which had been ordered subsequently under paragraph 2 of Article 66b of the Criminal Code, did not apply to preventive detention ordered, as in the case before it, under paragraph 3 of that provision.

25. On 6 February 2013 the Federal Constitutional Court quashed the decision of the Frankfurt am Main Court of Appeal of 22 August 2011 and remitted the case to that court (file no. 2 BvR 2122/11). The Federal Constitutional Court found that, having regard to the evaluation (*Wertungen*) of Articles 5 § 1 and 7 § 1 of the Convention, a subsequent order for a person's preventive detention or its continuation under Article 66b § 3 of the Criminal Code was only possible under the more restrictive conditions applicable to subsequent preventive detention orders under Article 66b § 2 of the Criminal Code. A person's preventive detention under Article 66b § 3 of the Criminal Code could therefore only be ordered if there was a high risk that the person concerned, owing to specific circumstances relating to his person or his conduct, committed the most serious crimes of violence or sexual offences and if, additionally, he suffered from a mental disorder within the meaning of the transitional provision of Article 316f(2), second sentence, of the Introductory Act to the German Criminal Code, which corresponded to that of section 1 § 1 of the Therapy Detention Act. The impugned decision of the Court of Appeal had not applied these standards.

26. Following the remittal of the case, the Frankfurt am Main Court of Appeal, on 27 September 2013, re-examined the applicant's appeal against the decision of the Marburg Regional Court, quashed it and remitted the case to that court, notably because a further expert opinion was required to

establish whether or not the applicant suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act. On 4 September 2014 the Marburg Regional Court, after having obtained a new opinion by expert L. and having heard the applicant, found that the requirements for ordering the continuation of the applicant's preventive detention were met. The decision was confirmed on appeal.

4. The place and conditions of the applicant's preventive detention

27. When he lodged his request for a reopening of the proceedings on 25 September 2012, the applicant was detained in Schwalmstadt Prison. In January 2013 he was transferred to a branch of Schwalmstadt Prison on the premises of Weiterstadt Prison. In September 2014 he was transferred to the newly built preventive detention centre at Schwalmstadt Prison.

5. Supervision of the execution of the Court's judgment in application no. 65210/09

28. The Committee of Ministers examined the case of *G v. Germany*, application no. 65210/09, during its 1215bis meeting on 17 December 2014, and twelve other judgments against Germany relating to the retrospective (*nachträglich*) extension or order of preventive detention and concerning the conditions of placement in preventive detention. Acting under the provisions of Article 46 § 2 of the Convention, which provides that it supervises the execution of final judgments of the European Court of Human Rights, the Committee of Ministers decided to close the examination of the applicant's case (Resolution CM/ResDH(2014)290 of 17 December 2014). It reiterated that the finding of violations by the Court obliged the respondent State, over and above the payment of just satisfaction awarded in the judgment, to adopt, where required, individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*, and general measures preventing similar violations. Having examined the action report provided by the Government which indicated the measures adopted in order to give effect to the judgments (document DH-DD(2014)1463), the Committee of Ministers was satisfied that all the measures required by Article 46 § 1 of the Convention had been adopted.

29. Action Report DH-DD(2014)1463 of 1 December 2014 noted, in respect of information about the measures taken to comply with the judgment in the case of *G v. Germany* (cited above), that the just satisfaction in the amount of EUR 12,140 euros awarded by the Court had been paid (see paragraph 114 of the report). In respect of the personal situation of the applicants in the thirteen cases examined, it noted that four individuals had been released, whereas two individuals had been detained in accordance with the Therapy Detention Act, which had entered into force on

1 January 2011, and seven individuals, including the applicant, were still in preventive detention (see paragraphs 116 et seq. of the report). The different proceedings concerning the applicant's preventive detention, which have been summarised above, are summarised in paragraphs 148 to 156 of the report.

B. Relevant domestic law and practice

1. General legal framework and reform of the preventive detention regime

30. For a comprehensive summary of law and practice, and reforms of the preventive detention regime in Germany, see *Ilnseher* (cited above, §§ 48-98). The Federal Constitutional Court's leading judgment of 4 May 2011, by which it held that all provisions concerned, both on the subsequent prolongation of preventive detention and on the subsequent ordering of such detention including, in particular, Article 66 of the Criminal Code in its version in force since 27 December 2003 and Article 66b § 3 of the Criminal Code in its version of 23 July 2004, were incompatible with the Basic Law, but that the provisions remained applicable until the entry into force of new legislation and until 31 May 2013 at the latest subject to a strict proportionality test, is summarised in paragraphs 68 to 75 of the *Ilnseher* judgment. The subsequent reforms of the German preventive detention regime, including the entry into force of the Preventive Detention (Distinction) Act on 1 June 2013, are summarised in paragraphs 76 to 81 of that judgment.

31. Section 316f of the Introductory Act to the Criminal Code, which entered into force on 1 June 2013, contains a transitional provision introduced by the Preventive Detention (Distinction) Act, including the requirements as to the continuation of subsequent preventive detention which was ordered prior to 1 June 2013 (see also *Bergmann v. Germany*, no. 23279/14, §§ 52-53, 7 January 2016). The person concerned must be suffering from a mental disorder and, owing to specific circumstances relating to his personality or conduct, it must be highly likely that he will commit a serious crime of violence or sexual offence as a result of his mental disorder (second sentence of section 316f(2) of the Introductory Act to the Criminal Code). If those additional requirements for the continuation of preventive detention are no longer met, the court declares the preventive detention terminated; supervision of the offender's conduct starts when the offender is released from detention (fourth sentence of section 316f(2) of said Act).

32. As of 1 June 2013 the interval for periodical review under Article 67e § of the Criminal Code of a particular preventive detention order has been reduced from two years to one year. The interval is reduced to nine

months once a preventive detention order has been executed for more than ten years. In such periodical review, courts are obliged, under Article 67d § 2 of the Criminal Code, to examine whether a particular preventive detention order might be terminated or suspended and a measure of probation applied.

2. The provision under which the applicant's subsequent preventive detention was ordered

33. The Subsequent Preventive Detention Act of 23 July 2004, which entered into force on 29 July 2004, inserted Article 66b into the Criminal Code. The provision, in its version in force at the relevant time, read:

Article 66b Subsequent order for placement in preventive detention

"(3) If an order for placement in a psychiatric hospital has been declared terminated pursuant to Article 67d § 6 because the conditions excluding or diminishing criminal responsibility on which the order was based no longer persisted at the time of the decision terminating the placement, the court may order preventive detention subsequently if

1. the placement of the person concerned under Article 63 was ordered on the basis of several of the offences listed in Article 66 § 3, first sentence, or if the person concerned had either already been sentenced to at least three years' imprisonment or had been placed in a psychiatric hospital because of one or more such offences, committed prior to the offence having led to that person's placement under Article 63, and

2. a comprehensive assessment of the person concerned, his offences and, in addition, his development during the execution of the measure revealed that it was very likely that he would again commit serious offences resulting in considerable psychological or physical harm to the victims."

The provision remained valid also under the Reform of Preventive Detention Act (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung*) of 22 December 2010, which entered into force on 1 January 2011, for offences committed after the entry into force of that Act. As a result of the abolition of paragraphs 1 and 2 of Article 66b of the Criminal Code by the said Act, the former paragraph 3, slightly amended, became the only provision of that Article.

3. Detention of persons with mental disorders

34. The provisions governing the detention of persons with mental disorders, notably Article 63 of the Criminal Code and the Therapy Detention Act, have been summarised in *Ilnseher* (cited above, §§ 84-90).

4. Provisions concerning the reopening of criminal proceedings

35. Article 359 no. 6 of the Code of Criminal Procedure provides that the reopening, for the convicted person's benefit, of proceedings which were concluded by a final judgment is permitted if the European Court of

Human Rights found that there had been a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or of its Protocols and if the judgment was based on that violation. Under Article 360 of the Code of Criminal Procedure, a request for reopening of the proceedings does not constitute an obstacle to execution of the judgment (paragraph 1). However, the court may order a postponement or suspension of the execution (paragraph 2). Article 368 § 1 of the Code of Criminal Procedure stipulates that the reopening request shall be dismissed as inadmissible if the request was not submitted in the prescribed form or if no statutory ground for reopening was invoked or no appropriate evidence was adduced.

COMPLAINTS

36. The applicant argued that the domestic courts' refusal to reopen the criminal proceedings against him, to quash the judgment of 13 March 2008 and to order his release, despite the fact that the Court, in its judgment of 7 June 2012, found that his subsequent preventive detention was in breach of Article 7 § 1 of the Convention, again violated that provision, as well as Article 46 § 1 read in conjunction with Article 1 of the Convention. He further complained that the refusal to reopen the criminal proceedings against him and to suspend the execution of his preventive detention and the resulting continuation of that detention violated Article 5 § 1 of the Convention.

THE LAW

37. The Convention provisions relied on by the applicant, in so far as relevant, read as follows:

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ..."

Article 7

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international

law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

Article 46

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

A. Preliminary remarks

38. The Court notes at the outset that it has previously dealt with the order of the applicant’s subsequent preventive detention by judgment of the Frankfurt am Main Regional Court of 13 March 2008, finding a violation of Article 7 of the Convention and awarding him EUR 5,000 in respect of non-pecuniary damage as well as EUR 7,140 in respect of costs and expenses. The Convention complaints now before the Court relate to the refusal of the domestic courts to reopen the proceedings, quash the judgment of 13 March 2008 and order his release. The complaints raise questions as to the execution of the Court’s judgment in the applicant’s previous case and the powers of the Court and the Committee of Ministers in this respect.

B. The parties’ submissions

1. The Government

39. The Government submitted that, in accordance with Article 46 of the Convention, the Court was not competent *ratione materiae* to examine the complaints, as they concerned the alleged lack of the proper execution of its judgment in the applicant’s previous case, and thus fell within the competence of the Committee of Ministers. The complaints did not raise a “new issue” undecided by the original judgment which would bring it within the Court’s jurisdiction. The complaints did not concern a continuing violation, as also evidenced by the fact that the Court, in its judgment in the applicant’s previous case, had found a violation of the Convention only in respect of the subsequent order of the applicant’s preventive detention, but not in respect of its continuation. The applicant’s request for reopening did not contain relevant new information. The decisions of the Darmstadt Regional Court and of the Frankfurt am Main Court of Appeal were based on the facts already examined in the applicant’s previous application and were limited to the issue of whether the applicant had made a substantiated submission as to the existence of a ground for reopening. The refusal to reopen the proceedings could not in itself give rise to a fresh violation of the Convention. Moreover, the Committee of Ministers had been aware that the domestic courts had refused the reopening of the proceedings and nonetheless ended its supervision of the execution of the Court’s judgment

in the applicant's previous case. The complaints in the present application were substantially the same, within the meaning of Article 35 § 2 (b) of the Convention, as in application no. 65210/09.

40. The Government emphasised that the continued necessity of the applicant's preventive detention was being reviewed at regular intervals and that the requirements for its continuation were found to be met, in a separate set of review proceedings, during the period of time at issue in the present case. The reopening of the criminal proceedings which the applicant had requested was, in fact, ill-suited to obtain his ultimate goal – his release from preventive detention. Even if the proceedings were reopened, this would not necessarily entail an outcome in the applicant's favour. Rather, a fresh assessment in fact and in law would have to be made by the domestic courts. However, such assessment was also regularly made during the aforementioned periodical review proceedings.

2. The applicant

41. The applicant submitted that the decisions, by which the Darmstadt Regional Court and the Frankfurt am Main Court of Appeal had refused the reopening of the proceedings, raised a "new issue" within the meaning of the Court's case-law under Article 46 of the Convention. The finding in respect of the continuing applicability of Article 66b § 3 of the Criminal Code, and the reliance on the criteria set out by the Federal Constitutional Court's leading judgment of 4 May 2011 in this respect, constituted relevant new information. In applying these criteria, the domestic courts, in the context of whether or not the proceedings had to be reopened, also engaged in a new substantive assessment of the subsequent order of the applicant's preventive detention.

42. In this respect, the domestic courts failed properly to take into account the Court's judgment in the applicant's previous case, in which the Court had found that the subsequent order of his preventive detention had breached Article 7 of the Convention. This breach had not been remedied as he remained in preventive detention on the basis of the judgment of 13 March 2008. That judgment had to be quashed and by finding that the reopening was not required because his subsequent preventive detention would, in any event, have been (lawfully) ordered, the domestic courts misapplied the Court's judgment in his previous case. It was not relevant that the continued necessity of his preventive detention had been confirmed – wrongly, in his submission, as he was not of unsound mind within the meaning of Article 5 § 1 (e) of the Convention – in the periodical review proceedings; these were not the subject of the present application. Lastly, his detention was carried out in an institution that was not suitable for mental health patients and the conditions of his preventive detention were quite similar to those of detainees serving a prison sentence, in breach of both Article 5 § 1 and Article 7 of the Convention.

C. The Court's assessment

1. General principles

43. In examining the admissibility of the present application, the Court must first of all ascertain whether it has jurisdiction to consider the applicant's complaint without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention. The relevant general principles have recently been summarised as follows in *Moreira Ferreira v. Portugal (no. 2)* ([GC], no. 19867/12, §§ 47-51, 11 July 2017):

> "47. The Court observes that in its judgments in *Bochan v. Ukraine (no. 2)* ([GC], no. 22251/08, ECHR 2015) and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], no. 32772/02, ECHR 2009) and its decision in *Egmez v. Cyprus ((dec.)*, no. 12214/07, §§ 48-56, 18 September 2012) it considered the issue of its jurisdiction in relation to the prerogatives of the respondent State and of the Committee of Ministers under Article 46 of the Convention. The principles set out by the Court in those judgments and that decision may be summarised as follows:
>
> (a) Findings of a violation in its judgments are essentially declaratory and, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 61).
>
> (b) The Committee of Ministers' role in this sphere does not mean, however, that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment and, as such, form the subject of a new application that may be dealt with by the Court. In other words, the Court may entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (*ibid*, § 62; see also *Bochan (no. 2)*, cited above, § 33, and *Egmez*, cited above, § 51).
>
> (c) On that basis, the Court has found that it had the competence to entertain complaints in a number of follow-up cases, for example where the domestic authorities had carried out a fresh examination of the case by way of implementation of one of the Court's judgments, whether by reopening the proceedings or by initiating an entirely new set of proceedings (see *Egmez*, cited above, § 52, and the references therein).
>
> (d) It transpires from the Court's case-law that the determination of the existence of a "new issue" very much depends on the specific circumstances of a given case and that distinctions between cases are not always clear-cut (see *Bochan (no. 2)*, cited above, § 34, and, for an examination of that case-law, *Egmez*, cited above, § 54). The powers assigned to the Committee of Ministers by Article 46 to supervise the execution of the Court's judgments and assess the implementation of measures adopted by States under that Article are not encroached on where the Court has to deal with relevant new information in the context of a fresh application (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 67).
>
> 48. The Court reiterates that it does not have jurisdiction to order, in particular, the reopening of proceedings (ibid., § 89). Nevertheless, as stated in Recommendation No. R (2000)2 of the Committee of Ministers, the practice of the Committee of

Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or the reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*, that is to say ensuring that the injured party is restored, as far as possible, to the situation which he or she enjoyed prior to the violation of the Convention. Among the cases in which the Court finds a violation, re-examination or reopening will be of particular importance in the field of criminal law, according to the explanatory memorandum to the Recommendation (see paragraphs 32 and 33 above).

49. It is therefore clear, as regards the reopening of proceedings, that the Court does not have jurisdiction to order such a measure. However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 89). For example, in the specific context of cases concerning the independence and impartiality of the Turkish national security courts, the Court has held that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial by an independent and impartial tribunal (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

50. That approach was confirmed in *Öcalan v. Turkey* ([GC], no. 46221/99, § 210, ECHR 2005-IV) and *Sejdovic v. Italy* ([GC], no. 56581/00, ECHR 2006-II). In the latter judgment the Court set out general principles (§§ 126 and 127) which may be summarised as follows:

(a) Where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law.

(b) In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded, provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence.

51. In exceptional cases, the very nature of the violation found may be such as to leave no real choice as to the measures required to remedy it, and this will prompt the Court to indicate only one such measure (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 202 and 203, ECHR 2004-II, and *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 138 and 139, ECHR 2013). On the other hand, in some of its judgments the Court has itself explicitly ruled out the reopening, following a finding of a violation of Article 6 of the Convention, of proceedings concluded by final judicial decisions (see, for example, *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 66, 30 November 2010)."

2. Application of these principles to the present case

44. The Court thus has to determine whether the present application concerns a “new issue” undecided by the Court’s judgment in the applicant’s previous case. It observes that the domestic courts did not reopen the initial proceedings, by which the applicant’s subsequent preventive detention had been ordered and which led to the Court’s judgment in the applicant’s previous case. The very refusal to reopen these proceedings is at the core of his Convention complaints which are now before the Court. The applicant did not allege a (fresh) procedural breach under Article 6 of the Convention in the decision refusing the reopening. Rather, the applicant alleges a further substantive breach of Article 7 of the Convention and a breach of Article 5 of the Convention through the refusal to reopen the initial proceedings.

45. The domestic courts, in their decisions refusing to reopen the proceedings, relied on legal considerations which had not been relied upon at the time of the initial order of the applicant’s subsequent preventive detention of 13 March 2008. They notably assessed the case against the stricter standards for ordering subsequent preventive detention which followed from the Federal Constitutional Court’s leading judgment of 4 May 2011 and found that the applicant’s subsequent preventive detention would also have been ordered under these stricter standards. In their view, the judgment ordering the applicant’s subsequent preventive detention in 2008 was thus not based on the breach of Article 7 of the Convention found by the Court in its judgment in the applicant’s previous case and the reopening of these initial proceedings was, consequently, not required.

46. The applicant argued that the domestic courts thus engaged in a substantive assessment of the lawfulness of the subsequent preventive detention order of 13 March 2008 and relied on new grounds when refusing to reopen the proceedings. In the Government’s submission, the reasoning of the domestic courts exclusively related to the question of whether or not there was a ground for reopening of the initial proceedings that led to the Regional Court’s judgment of 13 March 2008.

47. The Court notes that the requirements for the continuation of the applicant’s subsequent preventive detention were being reviewed, and confirmed, in a separate set of periodical review proceedings in parallel to the adjudication of the request for reopening (see paragraphs 24-26 above). As these review proceedings required a thorough and comprehensive assessment of whether the requirements for the applicant’s preventive detention continued to be met, they were suitable for achieving what the applicant ultimately sought to obtain, namely his release from preventive detention. The decisions of these review proceedings are not within the scope of the present application and the Court’s adjudication of the present application does not carry any prejudice as to the Convention compliance of the decisions taken in those proceedings.

48. The reopening of the initial proceedings, as requested by the applicant, was hence not the most efficient, nor the only means of achieving his release from preventive detention. Moreover, even if the proceedings had been reopened, this would not necessarily have entailed an outcome in the applicant's favour, as the domestic courts would have had to engage in a fresh assessment in fact and in law as to whether the requirements for the applicant's subsequent preventive detention were met. Such assessment, however, was also made during the periodical review proceedings – only with a view to a later point in time than at the time of the initial order in 2008. In this respect, the Court also reiterates that it had explicitly stated, in paragraph 70 of its judgment in the applicant's previous case, that that case only concerned the initial order for the applicant's subsequent preventive detention made by the Frankfurt am Main Regional Court on 13 March 2008, and that the Court's findings in that case were without prejudice to the Convention compliance of the applicant's current detention, which was, at the time, being reviewed by the domestic courts (see paragraph 5 above). The importance of the pending review proceedings was also highlighted in paragraph 86 of that judgment.

49. These circumstances allow the Court to draw the following conclusions: Firstly, the nature of the violation found by the Court in its judgment in the applicant's previous case did not require the reopening of the initial proceedings. The Court, which in any event cannot order this (see *Moreira Ferreira (no. 2)*, cited above, § 48), had also not indicated in that judgment reopening as an appropriate or the only appropriate way of redressing the violation of Article 7 of the Convention. Secondly, the applicant's request for reopening of the initial proceedings related to how the Court's judgment in the applicant's previous case was to be implemented at the domestic level. Thirdly, in refusing the applicant's request for reopening the domestic courts had regard to the High Contracting Parties' obligations under Article 46 of the Convention but did so only with a view to the question of whether or not there was a ground for reopening under domestic law, and they did not rely on new grounds capable of giving rise to a fresh violation of the Convention (see *Schelling v. Austria (no. 2)* (dec.), no. 46128/07, 16 September 2010; compare and contrast *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 65).

50. The Court observes that the Committee of Ministers, on 17 December 2014, that is, after the lodging of the present application, closed the examination of the case, noting that the reopening requested by the applicant had been refused (compare and contrast *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 67).

51. In the light of the foregoing, the Court considers that the Committee of Ministers' competence would be encroached upon if the Court were to examine this part of the present application, and that it is not competent

ratione materiae to examine it. This part of the application must therefore be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 20 June 2019.

Claudia Westerdiek Registrar	Yonko Grozev President